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Nos. 88-429, 88-494

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Appellees.

WASHINGTON LEGAL FOUNDATION,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT PUBLIC CITIZEN

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QUESTION PRESENTED*

Did the district court err in ruling that none of the provisions of the Federal Advisory Committee Act can be applied to the Department of Justice's use of the American Bar Association's Standing Committee on the Federal Judiciary without violating both the doctrine of separation of powers and the Appointments Clause of the Constitution?

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*Public Citizen, the appellant in No. 88-429 and an appellee in No. 88-494, was the plaintiff-intervenor in the court below. The Washington Legal Foundation, an appellee in No. 88-429 and the appellant in No. 88-494, was the plaintiff in the district court. Appellee Department of Justice was the defendant below, and appellee American Bar Association intervened as a party defendant in the district court after judgment was entered, for the purpose of participating in these appeals. No other parties, except those named in the caption, appeared in the district court.

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OPINION AND ORDER BELOW

The opinion and order of the district court are reproduced in an appendix to appellant's jurisdictional statement (App. 1a-30a).

JURISDICTION OF THIS COURT

This is an appeal from a final order of the United States District Court for the District of Columbia, entered on August 4, 1988, holding the application of an Act of Congress unconstitutional. App. 28a. A notice of appeal to this Court was filed on September 1, 1988. App. 29a. The Court noted probable jurisdiction on December 5, 1988, and, on the same day, consolidated this case with *Washington Legal Foundation v. United States Department of Justice, American Bar Association and Public Citizen*, No. 88-494. The jurisdiction of this Court was invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides, in relevant part, that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . ..

The Federal Advisory Committee Act, 5 U.S.C. App. II, is set out in an appendix to appellant's jurisdictional statement (App. 31a-45a).

STATEMENT OF THE CASE

This appeal seeks reversal of a district court ruling that a statute enacted by Congress to regulate the executive branch's use of advisory committees is unconstitutional as applied to an advisory relationship of vital importance to the public — the Justice Department's use of the American Bar Association's Committee on the Federal Judiciary to advise it concerning potential federal judicial

nominees. Before turning to the facts of this case, we first provide a brief overview of why the Federal Advisory Committee Act was enacted, what its various provisions require, and how it has been implemented by federal agencies for the past 16 years.

1. The Federal Advisory Committee Act

After holding extensive hearings in 1970 and 1971 on the 3,200 federal advisory committees then "circulating about without any substantial control over them," Congress concluded that it was essential to establish a comprehensive system for regulating this influential "fifth arm of the government." 118 Cong. Rec. 16,296 (1972) (Remarks of Rep. Monagan), *cited in* Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents*, 95th Cong., 2d Sess. 293 (Comm. Print 1978) ("Source Book"). Accordingly, when the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), was enacted in 1972, Congress recognized that, while advisory committees are "frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government . . . [,] standards and uniform procedures should govern the[ir] establishment, operation, administration and duration . . . ." 5 U.S.C. App. II § § 2(a), (b)(4). FACA was signed into law by President Nixon, who not only expressly endorsed the statute's "standards for the establishment, operation, termination, and control of advisory committees," but who also directed that the "heads of all executive departments and agencies shall take appropriate action to assure their ability to comply with the provisions of the Act." Executive Order 11,686 (1972), *reprinted in* Source Book at 340.

FACA does not regulate the subject matter that advisory committees may consider, nor does it in any way dictate the results of their deliberations. Instead, the Act establishes uniform rules governing the procedures and operations of such committees. Many of these rules parallel provisions found in other open

government statutes, such as the Freedom of Information Act, 5 U.S.C. § 552, the Government-in-the-Sunshine Act, 5 U.S.C. § 552b, the Privacy Act, 5 U.S.C. § 552a, the Presidential Records Act of 1978, 44 U.S.C. § 2201, and the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note. And, as is true with these other statutory schemes, the implementation of FACA is assigned to executive branch officials.

The first responsibility created by FACA is that the head of each federal agency using an advisory committee must supervise the committee's activities and assure that the committee assembles and maintains its reports, records, and other papers. 5 U.S.C. App. II § 8(b). Second, the agency head must file a charter for the committee which, among other things, describes the committee's functions and objectives and identifies the agency official to whom the committee reports. *Id.* § 9(c). Third, the statute provides that agencies must generally provide the public with "timely notice" of committee meetings, that a designated federal official must attend each such meeting, and that a "complete and accurate" record of "matters discussed and conclusions reached" must be maintained by the agency. *Id.* §§ 10(a)(2), (c), (e), (f). However, a committee meeting may be closed to the public in whole or in part if the agency determines that matters to be discussed at the meeting fall within one of the ten exemptions to the Government-in-the-Sunshine Act. *Id.* § 10(d); *see also* 5 U.S.C. § 552b(c).

Fourth, FACA requires that the agency maintain a public reading room containing copies of the records of its advisory committees, but the Act authorizes the agency to withhold any records that fall within one of the nine exemptions to the Freedom of Information Act. *Id.* § 10(b); *see also* 5 U.S.C. § 552(b). Finally, although FACA provides that the membership of advisory committees must be "fairly balanced in terms of the points of view represented and the functions to be performed," *id.* §§ 5(b)(2), (c), agencies have wide latitude in meeting this re-

quirement by defining the functions of their committees, as well as the type of representation that is relevant to the performance of those functions. *See National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

Since 1972, thousands of advisory committees have been chartered in accordance with FACA and have complied with the Act's various requirements. During fiscal year 1987 alone, according to the President's most recent report on the implementation of FACA, 57 Federal departments and agencies sponsored 992 advisory committees under the Act; a total of 19,837 individuals served as members of such committees; 3,430 committee meetings were held (1,830 of which were either totally or partially closed under one or more of the Act's exemptions); and 695 reports were issued. *See Sixteenth Annual Report of the President on Federal Advisory Committees* at 1, 3, 9 (1988). Reflecting the "diverse interests of the sponsoring agencies, committee activities covered topics from national security to specific fiscal, social and technical issues." *Id.* at 1. Of particular relevance here, 177 advisory bodies — 17.8% of the committees chartered under the Act — were created to review the qualifications and credentials of individuals being considered for various types of governmental grants and benefits. *Id.* at 2. Thus, numerous advisory bodies that are directly analogous to the ABA Committee have successfully performed their advisory functions while complying with FACA's requirements.

2. The ABA Committee

For a number of years, a committee of the American Bar Association, officially known as the American Bar Association's Standing Committee on the Federal Judiciary (the "ABA Committee"), has advised the Justice Department on potential nominees to the federal bench. Under the present system, the

Department initiates the advisory process by requesting the ABA Committee to investigate and evaluate the qualifications of potential nominees and to provide a formal recommendation concerning them to an Assistant Attorney General. App. 5a. Although the Department gathers information about prospective nominees from many sources, only the ABA Committee is regularly consulted before a recommendation is made by the Department to the President or before a nomination is sent by the President to the Senate. *Id.* Moreover, only the ABA Committee is given detailed information about judicial candidates to assist it in providing pre-nomination advice to the Department. *Id.*

The ABA's review process has "traditionally involved confidential interviews with lawyers, judges, and professors in the nominee's community, close scrutiny of the nominee's legal writings, and talks between Committee members and the nominee over the nominee's qualifications." *Washington Legal Foundation v. American Bar Ass'n*, 648 F. Supp. 1353, 1355 (D.D.C. 1986). After an investigation is completed, a report is prepared and circulated to the full ABA Committee, which then decides on a final recommendation — either "exceptionally well qualified," "well qualified," "qualified," or "not qualified." App. 6a. This recommendation is provided to the Justice Department, along with an indication of whether it is supported unanimously or simply by a majority of the Committee. *Id.* The rationale for a particular rating is sometimes provided to the Department as well. *Id.*

After the ABA Committee provides its recommendation, the Department, in conjunction with the President's judicial selection committee — which is not covered by FACA because it is composed entirely of full-time federal officials, *see* 5 U.S.C. App. II § 3(2)(C) — gathers information from other sources, including the Federal Bureau of Investigation and other government agencies. App. 5a. The Justice Department then forwards its recommendations to the President concerning the qualifications of persons who are being considered for federal judgeships. App. 7a.

After the President makes his selection, and the nomination is sent to the Senate, the Committee's rating is routinely made available to the Senate and the public. *Id.* The Senate, in determining whether to consent to a prospective appointee, also relies heavily on the Committee's rating, and occasionally solicits additional advice from the Committee as to how or why it arrived at a particular rating. App. 19a n.46, 25a.[1]

3. Proceedings Below

In 1986, the Washington Legal Foundation ("WLF") filed suit against the ABA Committee, seeking a declaration that it is a federal advisory committee and must therefore comply with FACA. *See WLF v. ABA Committee, supra*, 648 F. Supp. at 1355. That suit was dismissed on the ground that the proper defendant in this kind of FACA case is the government agency utilizing the committee — here, the Justice Department — and not a "private, pre-existing group that has not been established, appointed, and financed by the government." *Id.* at 1361.

Shortly before the dismissal of the suit against the ABA Committee, WLF filed this action against the Justice Department, asserting that, although the Department routinely solicits the ABA Committee's advice and recommendations regarding prospective judicial nominees, it is not complying with any of FACA's requirements. Jurisdiction in the district court was based on 28 U.S.C. § 1331. In response, the Justice Department moved to dismiss the complaint on two independent grounds: (1) that the ABA Committee is not subject to FACA because it is not being utilized as a federal advisory committee; and (2) that FACA cannot be constitutionally applied to the ABA Committee.

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[1]With respect to nominees to this Court, the Committee prepares and provides ratings to the Senate, even though the President no longer obtains advice from the Committee before making his selection. Since FACA applies only to the executive branch's use of advisory committees, and not to the Senate's, 5 U.S.C. App. II § § 3(2), 3(3), the Committee's activities regarding nominees to this Court are not subject to FACA.

Upon learning that the Justice Department had challenged the constitutionality of FACA, appellant Public Citizen, a non-profit, public-interest organization, moved to intervene as a party plaintiff because "resolution of this case — especially the constitutional issue raised by the government — may have an enormous impact on Public Citizen's rights and interests under FACA in the future." Memorandum of Points and Authorities in Support of Motion to Intervene at 3.

Along with its motion to intervene, which was granted without opposition, Public Citizen filed a complaint for declaratory and injunctive relief and a motion for summary judgment, which differed from the papers that had been filed by WLF in a number of significant respects. Thus, in language similar to that employed by WLF, Public Citizen's complaint contended that the ABA Committee "is a federal advisory committee as that term is defined in section 3(2) of FACA, because defendant Department of Justice is, and has been, utilizing it in the interest of obtaining advice and/or recommendations." Complaint, ¶ 3 (J.A. 26). However, because FACA assigns the responsibility for implementing its various provisions to the Department, and also affords the Department considerable flexibility in determining how those provisions should be implemented, Public Citizen, in contrast to WLF, recognized that it would be inappropriate for a court to rule on whether or how any of the statute's specific requirements should be met before the Department itself had an opportunity to make these determinations. Hence, Public Citizen's complaint simply asked the district court to enter an order "declaring that the Justice Department's utilization of the ABA Committee is covered by FACA, and ordering the Department to comply with FACA's requirements when it utilizes the ABA Committee in the future." Complaint, p. 4 (J.A. 26).

Moreover, while WLF argued below that there were factual disputes regarding the ABA Committee that needed to be explored through discovery, Public Citizen disagreed and instead filed a motion for summary judgment. With respect to the Justice

Department's constitutional defense, Public Citizen's summary judgment memorandum pointed out that the Justice Department had never explained how, or even which of, FACA's various requirements would hamper the Department's use of the Committee, but instead had launched an "undifferentiated, generalized attack on the application of any and all of FACA's provisions . . . ." *Id.* at 2. Relying heavily on this Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), Public Citizen urged the district court to decide only those constitutional questions that must be resolved at this juncture, *i.e.*, the constitutionality of FACA's threshold requirements of filing a charter, designating a federal oversight officer, and announcing committee meetings in advance. The Department has never argued that these requirements would impair its use of the Committee.

Nevertheless, the district court (Judge Joyce Hens Green) entered judgment in favor of the Department. The court agreed with plaintiffs that "the ABA Committee is an advisory committee 'utilized' by DOJ within the meaning of FACA, 5 U.S.C. App. II, § 3(2)," but held that "FACA cannot constitutionally be applied to the ABA Committee because to do so would violate the express separation of nomination and consent powers set forth in Article II of the Constitution and because no overriding congressional interest in applying FACA to the ABA Committee has been demonstrated." App. 4a.

At the outset of its opinion, the court rejected the Department's statutory argument, finding that the Department's use of the Committee is covered by the "plain language" of the statute, App. 7a., which defines an "advisory committee" as "***any*** committee" that is "established or ***utilized*** by one or more agencies . . . in the interest of obtaining advice or recommendations . . .." 5 U.S.C. App. II § 3(2) (emphasis added). The court further found that the Department's use of the Committee constitutes precisely the sort of advisory relationship that Congress intended to subject to FACA's procedural requirements:

> [T]he ABA Committee is a formal committee, with a clearly defined structure, singular purpose, and apparently only two "clients" — the Attorney General and the Senate Judiciary Committee. The ABA Committee is not merely a group of casually associated individuals who are consulted singly; it self-consciously and purposefully acts "as a committee." The ABA Committee is thus a traditionally, routinely, and preferentially utilized source of advice for DOJ and the President on potential nominees for federal judgeships.

App. 10a-11a (footnotes omitted). Since the "plain language of FACA, its legislative history, its purpose, and GSA's interpretation of the Act all support the conclusion that the ABA Committee falls within FACA's definition of advisory committee," the district court reasoned that the constitutional issue raised by the Justice Department "cannot fairly be avoided" without "press[ing] statutory construction 'to the point of disingenuous evasion.'" App. 14a, *quoting United States v. Locke*, 471 U.S. 84, 96 (1985).

The district court then ruled that none of FACA's requirements may constitutionally be applied to the Department's use of the ABA Committee. Initially, the court considered the Appointments Clause in Article II, under which the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .." U.S. Const. art. II, § 2, cl. 2. According to the district court, "the conclusion that the legislative branch cannot intervene in the Executive's selection process for judicial nominees springs directly from the text of the Constitution," App. 19a, but the court never explained which part of the Appointments Clause mandates that conclusion or how any of the provisions of FACA would constitute "interven[tion] in the Executive's selection process."

The district court chose not to base its decision entirely on

the Appointments Clause. Rather, it determined that, "because the Supreme Court has suggested that a more flexible, pragmatic approach be applied in analyzing separation of powers issues," it should also engage in a "balancing analysis" — *i.e.*, assessing the degree to which the application of FACA would impair the President's nominating power and then balancing that impairment against the congressional interests served by the Act. App. 19a.

With regard to the impairment side of the equation, the court asserted, without any explanation, that the application of the Act to the ABA Committee creates a "significant potential for disruption of the President's constitutional prerogative . . .." App. 20a. Although the court stated that "[t]he hallmark of the ABA Committee's relationship with DOJ and its evaluation process is confidentiality," App. 21a, it did not explain why the Advisory Committee Act, which was carefully crafted to safeguard legitimate interests in confidentiality, would not adequately protect the work of the ABA Committee. While the court acknowledged that even advisory committees dealing with "sensitive foreign policy or national security issues" have successfully complied with FACA's requirements, App. 24a, it nonetheless concluded that the ABA Committee cannot be required to comply with the law because its mission involves "investigation of an individual's competence, integrity, and temperament." App. 24a.

Having found a "potential for significant disruption" if FACA were applied to the Justice Department's use of the ABA Committee, the court proceeded to consider whether there is an "'overriding' congressional interest in application of FACA to the ABA Committee." App. 25a. The court determined that there is no such interest for two interrelated reasons. First, Judge Green asserted that the "only role for Congress in the nomination process envisioned by the Constitution is the Senate's advice and consent function," and thus no other legitimate legislative objective — such as the public's interest in ensuring that the Justice Department obtains advice from the ABA Com-

mittee in accordance with FACA's minimum legal standards of accountability, openness, and record keeping — could be advanced through the application of FACA in this case. App. 25a. Second, the court concluded that, even if public accountability is a legitimate congressional purpose, this objective is fully "satisfied through the confirmation proceedings, where the Senate Judiciary Committee has the opportunity to question a representative from the ABA Committee and to request additional information." *Id.* On the basis of these conclusions, the district court ruled that no part of FACA can be constitutionally applied to the Justice Department's use of the ABA Committee. App. 26a-27a.

SUMMARY OF ARGUMENT

As the district court held, there can be no genuine dispute that the Justice Department's use of the ABA Committee falls squarely within the coverage of FACA. Both the statutory language and legislative history, as well as the constructions of the law by the courts and the General Services Administration ("GSA"), compel the conclusion that Congress intended to apply FACA's standards of public accountability to the executive branch's use of entities such as the ABA Committee, which are "traditionally, routinely, and preferentially utilized sources[s] of advice. . . ." App. 11a.

While the district court correctly found that it could not construe FACA so as to avoid the Justice Department's constitutional challenge, it failed to follow this Court's instructions regarding the proper resolution of such a challenge. First, contrary to this Court's dictates, the district court accepted the Justice Department broad-scale attack on a comprehensive, multifaceted statutory scheme, when many of FACA's provisions would not even arguably infringe on the President's ability to nominate federal judges. Thus, the district court should not have ruled on the "constitutionality of all the separate phases of a comprehensive statute," *Watson v. Buck*, 313 U.S. 385, 402 (1941),

but should have instead focused on those features of the law that would *necessarily* be triggered by a threshold ruling that the Justice Department's use of the ABA Committee is covered by FACA.

Under such a ruling, only three events would definitely occur: (1) the Department would be required to prepare and file a charter for the ABA Committee, 5 U.S.C. App. II § 9(c); (2) the Department would be required to designate an Advisory Committee Management Officer who would be responsible for maintaining the records of the Committee and supervising overall compliance with the law, *id.* § 8; and (3) the Department would be required to provide the public with advance notice of committee meetings, *id.* § 10(a)(2). It is inconceivable, and the Justice Department has never argued, that these requirements alone would in any way adversely affect the Department's ability to use the Committee, let alone impair the President's actual nominating function. Instead, the government has focused its dissatisfaction on statutory provisions that provide for public access to *some* advisory committee documents and *some* committee meetings, yet the applicability of these provisions to any particular meeting or document of the ABA Committee is entirely conjectural at this time.

Second, the district court not only entertained "speculative questions based upon purely hypothetical fact situations," *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 335 (D.D.C. 1976) (three-judge district court), *aff'd*, 433 U.S. 425 (1977), but it compounded its error by assuming worst-case scenarios regarding the application of the statute's meeting and document production provisions. Thus, while the Department has considerable latitude in implementing these provisions to avoid any adverse effect on its use of the Committee's recommendations, the district court simply assumed that FACA would necessarily breach the confidentiality of the Committee's evaluations of potential nominees to the federal bench. In so doing, the court failed to recognize that its task is "not to destroy the

Act if [it] can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973).

Third, the district court's verdict of unconstitutionality is fundamentally inconsistent with this Court's ruling in *Morrison v. Olson*, ____ U.S. ____, 108 S. Ct. 2597 (1988), which upheld the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. According to the district court, Congress has little, if any, constitutional authority to enact any law that has even a peripheral bearing on the power to nominate federal judges because the Constitution assigns the nomination function to the President. In *Morrison*, however, the Court emphatically rejected the Justice Department's virtually identical argument that Congress is prohibited from enacting any laws bearing on the prosecutorial power simply because the President is assigned the responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3.

If anything, the Independent Counsel provisions at issue in *Morrison*, which actually *displace* the President's power to control a particular class of cases, infringe far more on the President's authority than does FACA, which leaves the President's power to make judicial appointments entirely intact and, at most, could only indirectly affect the nominating process. Indeed, in light of *Morrison*, *Nixon v. Administrator*, and other separation of powers decisions upholding broad legislative schemes, including the Court's recent decision in *Mistretta v. United States*, ____ U.S. ____, No. 87-7028 (U.S. Jan. 18, 1989), there is no basis for concluding that a procedural statute, such as FACA, cannot constitutionally be applied to an advisory committee that does not even report directly to the President.

Finally, the Court should give short shrift to the First Amendment argument raised for the first time in the ABA's response to appellants' jurisdictional statements (at 13-16). There is no reason to deviate from the well-established principle that new

arguments should not be considered for the first time in this Court. In any event, the argument has no validity because FACA does not impede the ability of the ABA or anyone else to exercise First Amendment rights. Rather, FACA is simply directed at the Department's decision to use the ABA Committee as a routine, preferred source of advice and recommendations on judicial nominations. The ABA does not have a First Amendment right to have special access to otherwise confidential governmental information or to have a role in government decisionmaking that is not afforded to other members of the public. If the ABA wishes to play a special role in the nomination process, it must abide by FACA's provisions, and nothing in the First Amendment allows it to avoid that responsibility.

ARGUMENT

Before turning to the district court's constitutional ruling, appellant will first address the Department's statutory argument, which the district court rejected. As appellant will demonstrate, no "construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961).

I. THE JUSTICE DEPARTMENT'S USE OF THE ABA COMMITTEE IS COVERED BY FACA.

A. Statutory Language

While FACA's procedural requirements are modest, its coverage is not. Congress envisioned the Act as a "comprehensive scheme to control the creation and operation of advisory committees in the executive branch of the federal government." *Center for Auto Safety v. Cox*, 580 F.2d 689, 692 (D.C. Cir. 1978). Thus, section 3(2) of the statute broadly defines an advisory committee as

> *any committee*, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . .
>
> (B) established or *utilized* by the President, or
>
> (C) established or *utilized* by one or more agencies, *in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government* . . ..

5 U.S.C. App. II § 3(2) (emphasis added). Since the ABA Committee was not "established" by the Justice Department, the core statutory question is whether the Committee is being "utilized" by the Department "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . .." *Id.* at § 3(2)(C). Obviously, if the Court relies on the "ordinary meaning" of FACA's language, as is generally appropriate in issues of statutory construction, *Kosak v. United States*, 465 U.S. 848, 853 (1984), the question is not difficult to resolve. As the district court pointed out, the "common-sense meaning of 'utilized' is to 'make use of.'" App. 8a, *quoting Webster's Third New International Dictionary* (1963). The Department has never seriously disputed that it routinely "makes use of" the ABA's Committee's recommendations regarding the qualifications of potential candidates for the federal bench. To the contrary, the Department admitted below that "[o]ne source of advice and information used by the Attorney General in advising the President is the ABA . . . Committee." Defendant's Memorandum of Points and Authorities in Support of Its Motion to Dismiss at 9; *see also* Plaintiff-Intervenor's Statement of Material Facts at ¶ 5, which was admitted by the Department ("the Justice Department and the President *utilize* the recommendations and evaluations of the ABA Committee in determining whether to nominate individuals for federal judgeships") (emphasis added) (J.A. 31).

Indeed, as the district court emphasized, "the ABA Committee is the *only* non-governmental entity routinely provided the names of potential nominees by DOJ in advance of public announcement," and which "in return . . . provides its recommendation and report" to the Department and eventually the Senate. App. 10a (emphasis added). Thus, this is not a situation where an agency actively solicits advice from many outside institutions and gives equal weight to each. Rather, the Department "has directly solicited from the ABA Committee its evaluation of and recommendation on federal judicial nominees" for over 30 years, and concededly places heavy reliance on the Committee's advice. App. 10a. Accordingly, the "clear and unequivocal" language of section 3(2) of FACA encompasses the Department's use of the ABA Committee. *United States v. Oregon*, 366 U.S. 643, 648 (1961); *see also TVA v. Hill*, 437 U.S. 153, 173 (1978).

B. Interpretation By GSA And The Courts

The district court's conclusion is reinforced by the interpretation given to the Act by both the courts and the General Services Administration, the agency responsible for administering the Act. *See* Executive Order 12,024, 42 Fed. Reg. 61,445 (1977). GSA's regulations have consistently defined a "utilized" advisory committee as

> a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations . . ..

52 Fed. Reg. 45,930 (1987); *see also* 41 C.F.R. § 101-6.1003 (1983). This definition, which was not criticized by the Justice

Department or any other commenter when proposed in 1987, *see* 52 Fed. Reg. 18,776 (1987), could hardly describe the ABA Committee more perfectly. Thus, the Committee (1) has had an "established existence" outside the Federal Government for over thirty years; (2) is composed "in whole . . . of other than fulltime officers or employees of the Federal Government;" (3) has been adopted by the Department as a "preferred source from which to obtain advice or recommendations" on a "specific issue or policy," namely, the qualifications of potential judicial nominees; and (4) is "not merely a group of casually associated individuals who are consulted singly" but, rather, "self-consciously and purposefully acts 'as a committee.'" App. 11a, *quoting Hearings Before the Committee on the Judiciary of the United States Senate: Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess. 938 (1987) (testimony of ABA Committee Chairman Harold Tyler). In other words, the Committee is being used by the Department in precisely the "same manner as [the Department] would obtain advice or recommendations from an established advisory committee," except that the Department is not complying with any of FACA's requirements. 52 Fed. Reg. 45,930 (1987).[2]

Judicial constructions of FACA coincide with GSA's approach. For example, *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), involved meetings between the Federal

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[2]As the district court pointed out, GSA's regulations also "set forth several specific examples of types of advisory committees exempt from the Act . . . none of which apply to the ABA Committee. Indeed, several mention by implication certain characteristics of the ABA Committee that bring it within the Act's purview." App. 13a. *See, e.g.* § 101-6.1004(i) (exempting groups convened by federal officials for the purpose of "obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations"; indicating that where a group is used "to obtain consensus advice" it is covered by the Act).

Highway Administration ("FHWA") and the American Association of State Highway and Transportation Officials ("AASHTO"), an organization consisting of state transportation officials. The district court found that AASHTO was "utilized" as an advisory committee because "the government went directly to AASHTO, among other groups, for specific advice on pending draft regulations. In doing so, the government employed AASHTO much as advisory committees are frequently and traditionally employed." 414 F. Supp. at 224. This ruling was affirmed by the D.C. Circuit:

> [W]e find nothing in the regulatory scheme of the Act to suggest that Congress intended to exclude organizations fitting the definition of advisory committee from coverage simply because they have an existence independent of the agency utilizing them . . . . [W]hen the Administrator [of the FHWA] in the course of developing regulations to govern the Federal-aid highway program discloses his proposed regulations to select groups and obtains their advice and recommendations, he utilizes those groups as advisory committees.

Center for Auto Safety v. Cox, supra, 580 F.2d at 694.

A similar result was reached in *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2d Cir. 1979), where the Food and Drug Administration ("FDA") was considering whether to take regulatory action with regard to the use of liquid protein products in dieting. In order to "assist the FDA in selecting the best course of action," agency officials decided to "obtain the advice of experts in the field of obesity research" and thus met with a group of such experts. *Id.* at 329-30. In determining that the meeting was covered by FACA, Judge Friendly "considered the directness of the relationship between the alleged advisory committee and government action," and emphasized that the FDA had "leaned . . . strongly on the advisory group" in framing the regulation at issue. *Id.* at 336 & n.10.

One other decision construing FACA is also instructive because, although it found that FACA did not apply, its reasoning directly supports the application of the law to the Justice Department's use of the ABA Committee. In *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975), Judge Gesell held that FACA did not cover a series of meetings between executive branch officials and varying private sector groups. In so holding, he reasoned that FACA "was not intended to apply to all amorphous, ad hoc group meetings," or to "impede casual informal contacts by the President or his immediate staff with interested segments of the population . . .." *Id.* at 1233-34. Rather, Congress intended to cover "groups having some sort of established structure and defined purpose as 'advisory committees,'" and which receive a governmental "request for specific recommendations on a particular matter of governmental policy." *Id.* In contrast, the Department here concedes that the ABA Committee has an established structure and defined purpose as an advisory committee, and that its very reason for being is to respond to the Department's request for advice regarding potential judicial nominees.

C. Legislative History

FACA's legislative history confirms the courts' common-sense reading of FACA's language, and demonstrates that entities like the ABA Committee were clearly within Congress' contemplation when it drafted FACA. Thus, while the House bill, as originally reported, did not expressly cover advisory bodies that are "utilized" by executive branch agencies, the committee report stated that the definition of advisory committee was "meant to include those committees which may have been organized before their advice was sought by the President or any agency, but which are used by the President or any agency in the same way as an advisory Committee formed by the President himself or the agency itself." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4

(1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3494.

The House Report further emphasized that "[i]t would be contrary to the purpose and intent of this bill" if independent entities used as advisory bodies "were to be exempted from the provisions of this bill." *Id*; *see also Lombardo v. Handler*, 397 F. Supp. 792, 798 (D.D.C. 1975). In addition, as an example of a committee subject to the Act, the House cited the Advisory Council on Federal Reports ("ACFR"), which was organized by national business organizations and utilized by the Office of Management and Budget ("OMB") to obtain advice on executive branch reporting and information-gathering activities. *See* House Report at 6.

On the Senate side, it was even clearer that entities like the ABA Committee were to be covered by the law. The Senate bill defined an advisory committee as encompassing "any committee . . . established or organized for the purpose of furnishing advice, recommendations, or information to any office or agency." The Senate Report explained, in unequivocal terms, that

> the intention is to interpret the words "established" and "organized" in their ***most liberal sense***, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, ***and whether or not Federal money is expended***, to obtain advice and information, such group is covered by the provisions of this bill.

S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972), ***reprinted in*** Source Book at 158 (emphasis added). Thus, it is evident that both the House and Senate committees wanted FACA to cover advisory bodies that are structured like the ABA Committee, *i.e.*, independent entities that develop an advisory relationship with the President or with a federal agency. Finally, in order to make that intent crystal-clear, the definition of advisory committee was amended in conference to explicitly provide that all

committee which are "established or utilized" by the executive branch are within the coverage of the statute. H. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 9 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3509.

D. Appellees' Statutory Arguments Are Groundless.

In an effort to avoid the seemingly inevitable conclusion that the ABA Committee is subject to FACA, the Justice Department and the ABA have raised several arguments, none of which has merit. First, the Department argued below that Congress "has given absolutely no indication in the FACA or its legislative history that it contemplated that FACA would apply" specifically to the ABA Committee. Def. Mem. at 21; *see also* ABA Mem. at 20. However, since Congress crafted FACA as a comprehensive, remedial statutory scheme, it obviously did not need to shoulder the herculean burden of enumerating each and every committee that would be covered by the law, just as it did not specify in the Freedom of Information Act every document that would be subject to that statute. Rather, it drafted a broad statutory definition of advisory bodies that are subject to the Act and referred, in the legislative history, to a few representative examples of committees that are covered, including the Advisory Council on Federal Reports, which is virtually identical in form to the ABA Committee. In this legislative and statutory context, it does not assist appellees in the slightest that the ABA Committee is not one of the few specific committees mentioned in FACA's legislative history, especially since Congress recognized that "[o]ver 2,600 interagency and advisory committees exist today and it is possible that this figure could be as high as 3,200." 117 Cong. Rec. 17,070 (1971) (Statement of Sen. Roth), *reprinted in* Source Book at 139.

To the contrary, as the district court observed, it is far more probative that appellees have been unable to "point[ ] to any in-

dication that Congress intended *to exempt* the ABA Committee from FACA." App. 9a n.23 (emphasis in original). Rather than list each and every committee covered by FACA, Congress enumerated, in the statute itself, those few advisory bodies that are *not* covered by the law, *i.e.*, committees of the Central Intelligence Agency and the Federal Reserve System, as well as "any local civic group whose primary function is that of rendering a public service . . .." 5 U.S.C. App. II § 4(b), (c). Thus, if it is true that Congress was "obviously aware of the ABA's longstanding involvement in the judicial nomination process," as the Justice Department asserted below, Def. Mem. at 21, the necessary conclusion is that Congress deliberately chose not to exclude it from FACA.

The second statutory argument that has been advanced by appellees is even more strained. The Department has essentially contended that the courts may ignore the language, legislative history, and GSA interpretation of FACA, and instead find that the ABA Committee is not covered by the statute, simply because it does not, according to appellees, involve "private special interest groups' excessive influence over federal agencies with regulatory authority or control over matters of direct concern to those groups." Def. Mem. at 12-13; *see also* ABA Mem. at 19 ("the Committee is not a narrow special interest group out to promote its particular viewpoint to a federal agency with regulatory responsibility over that group").

Even if the Court were free to disregard the statutory language itself, the Department's argument does not accurately reflect the congressional objectives underlying FACA. As the district court found, "Congress' purpose was much broader" than simply regulating a narrow class of advisory committees that are dominated by "special interest groups." App. 12a. To the contrary, the Senate Report stated that the overall purpose of the Act is to "prescribe certain standards and procedures governing the establishment and operation of advisory committees in the Federal government," which obviously applies as much to

the ABA Committee as it does to any other advisory body that is established or utilized by the government. S. Rep. No. 1098, 92d Cong., 2d Sess. 1 (1972). The Senate Report also explained that the purpose of the law is to

> strengthen the authority of Congress and the executive branch to limit the use of Federal advisory committees to those that are necessary and serve an essential purpose; provide uniform standards for the creation, operation, and management of such committees; provide that the Congress and the public are kept fully and currently informed as to the number, purposes, membership, and costs of advisory committees, including their accomplishments, and assure that Federal advisory committees shall be advisory only.

Id. The House Report contains a similar description of the statute's objectives. *See* H.R. Rep. No. 1017, 92d Cong., 2d Sess. 1 (1972). Once again, each of these Congressional interests will be furthered if FACA is applied to the government's use of the ABA Committee. Just as the FOIA applies to the records of all executive branch agencies — not simply those agencies that are engaging in illegal or improper conduct — FACA's basic standards of public accountability cover all entities that develop a preferred, ongoing advisory relationship with executive agencies — not simply those composed of special interest groups that are exerting improper influence on governmental policy.[3]

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[3]If Congress' sole interest was in regulating advisory relationships that involve an actual or potential conflict of interest, then it could simply have enacted section 5(b) of FACA, which provides that advisory committees should not be "inappropriately influenced . . . by a special interest" and must be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. II § § 5(b)(2), (3). Because FACA was not so limited, it seems plain that Congress intended that all advisory committees would *both* avoid conflicts of interests and comply with FACA's other administrative and procedural requirements.

Moreover, this is the interpretation of FACA which the government has — until now — consistently given to the law. Thus, numerous advisory bodies that have been established and that have complied with FACA pose far less of a potential than exists here for "private special interest groups' excessive influence over federal agencies." Def. Mem. at 13. To take one notable example, the President's Special Review Board, otherwise known as the Tower Commission, was established to analyze the activities and procedures of the National Security Council and provide recommendations directly to the President. Certainly, former National Security Adviser Brent Scowcraft, former Senator John Tower, and former Secretary of State and Senator Edmund Muskie — the Commission's members — were not attempting to exert "influence over federal agencies with regulatory authority" over them, *id*, yet that did not stop the government from treating their advisory functions as subject to FACA. *See* 51 Fed. Reg. 43,718 (1986).[4]

* * * * *

Although the district court was "cognizant of its duty to 'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided,'" App. 14a, *quoting Int'l Ass'n of Machinists v. Street*, 367 U.S. 740,

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[4]In its response to appellants' jurisdictional statement, the ABA suggested, for the first time, an additional statutory argument, *i.e.*, that the Committee's ratings do not constitute "advice or recommendations" within the meaning of the statute. ABA Mem. at 17. This argument is apparently based on the proposition that "[e]ven when the ABA Committee finds that a prospective nominee is 'not qualified,' it does not recommend that the nominee be removed from consideration." *Id.* at 17 n.14. Obviously, however, a statement that a particular individual is or is not "qualified" to be a federal judge constitutes "advice" under any reasonable construction of that term. In fact, the ABA's answer to plaintiff-intervenor's complaint "admits that the ABA Committee investigates and evaluates prospective federal judicial nominees and *advises* the Department of Justice of these evaluations." J.A. 64 (emphasis added).

749-50 (1961), it recognized that it could not "press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96 (1985), *quoting George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). In view of FACA's plain language, legislative history, underlying purposes, construction by GSA, and longstanding interpretation by the courts, nothing short of "disingenuous evasion" would enable the Court to avoid the constitutional issues raised by appellees, to which we now turn.

II. THERE IS NO CONSTITUTIONAL BARRIER TO THE APPLICATION OF FACA TO THE ABA COMMITTEE.

A. The Appointments Clause Does Not Prohibit The Application Of FACA's Requirements To The Justice Department's Use Of The ABA Committee.

1. The district court's holding that the Appointments Clause prohibits the application of FACA to the ABA Committee has no grounding in the language of the Clause itself or in rulings of this Court. According to the district court, there is a constitutional infirmity because the legislative branch has "intervene[d] in the Executive's selection process for judicial nominees," and that action is "directly" forbidden by the "text of the Constitution." App. 19a. This proposition is in error for several reasons.

First, the legislative branch has done nothing beyond enacting FACA, and has reserved for itself no role whatsoever in that statute's execution. *Compare Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not exercise removal power over officer performing executive functions); *INS v. Chadha*, 462 U.S. 919 (1983) (Congress may not control execution of the laws ex-

cept through Article I procedures). Indeed, the implementation of the Act's procedural requirements is delegated to the very executive branch agency that uses the advisory committee (here, the Justice Department), a factor found to be of considerable importance in the Court's decision to sustain the statutes at issue in *Morrison v. Olson*, *supra*, 108 S. Ct., at 2621, and *Nixon v. Administrator*, *supra*, 433 U.S., at 441.

Accordingly, this case simply does not pose the "danger of the Legislative Branch's accreting to itself judicial or executive power . . .." *Mistretta v. United States*, slip op. at 21. Indeed, FACA does not even go so far as to "commingle the functions of the Branches" in the implementation of the law, although statutory schemes doing so have been sustained by the Court so long as they do not pose the danger of legislative usurpation. *Id.* (upholding the involvement of judges in rulemaking); *Morrison*, *supra*, 108 S. Ct., at 2614 (upholding role of special court in creating and terminating office of independent counsels); *Commodity Futures Trading Comm'n v. Schor*, *supra* (upholding agency's assumption of jurisdiction over common-law counterclaims).

Second, it is difficult to understand what the district court meant by "interven[tion] in the Executive's selection process" since the district court never explained which specific aspects of FACA would "intervene" in the nomination process and in what manner. While a law that attempted to control directly the President's choice of judicial nominees might impermissibly intrude on his appointment power, FACA is certainly not such a statute. Thus, FACA does not circumscribe in any way who the President may appoint as a federal judge, but merely imposes on the Justice Department's use of the ABA Committee the same standards of public accountability that are imposed on the use of every federal advisory committee.

Finally, the district court stated that the basis for its decision was the actual text of the Appointments Clause, which provides, in relevant part, that the President "shall nominate . . . Officers

of the United States," including federal judges, "by and with the Advice and Consent of the Senate . . .." U.S. Const. art. II § 2, cl. 2. However, there is nothing in FACA's design or structure that deprives the President of his authority under the Clause or assigns to Congress any role whatsoever in the nomination process. Again, the district court never explained which part of this Clause is violated by any part of FACA. In the absence of such a connection, the finding of unconstitutionality cannot stand.

2. The district court attempted to buttress its reading of the Appointments Clause with a statement made by Alexander Hamilton in *The Federalist*. App. 16a—17a. However, not only does this statement provide no support for the district court's approach to the Clause but, more importantly, when the full views of Hamilton and the other Framers are considered, they clearly coincide with the public accountability objectives that underlie FACA.

During the constitutional convention, much consideration was given to allowing the Senate to make judicial appointments by itself, without any involvement by the President. Thus, on July 18, 1787, the Convention discussed Resolution 11, which was entitled "The Judges to be Appointed by the 2d branch of the National Legislature." 2 M. Farrand, *The Records of the Federal Convention* 41 (2d ed. 1937). This resolution was opposed by some, not because it was thought that the President had a more direct and legitimate interest in judicial appointments than did Congress, but because the "Executive would certainly be more answerable [to the public] for a good appointment, [just] as the whole blame of a bad one would fall on him alone." *Id.* at 42. Those who favored appointment by the legislature contended, on the other hand, that the legislature "[b]eing taken from all the States . . . would be best informed of characters [and] most capable of making a fit choice." *Id.* at 41.

On July 21, James Madison made a motion to assign the power

of judicial nomination to the President and to require two-thirds of both houses of the Congress to reject a nominee. There was substantial objection to this motion on the ground that it did not afford Congress a sufficient role in the process, and, concomitantly, that it would give the President excessive "influence over the Judiciary department itself." 2 M. Farrand, *supra*, at 83. Not only did Madison's motion fail, but the resolution for the direct appointment of judges by the Senate was passed by a 6 to 3 vote. *Id.* A month later, the Committee on Detail codified this resolution in its proposed constitution, assigning the sole power of judicial appointments to the Senate.

In August and September, however, the "Committee of eleven" revisited the question of judicial appointments and proposed to the Convention a compromise between appointment by the Senate and the Madison motion. On September 4, the Committee of eleven proposed that the "President . . . shall nominate and by and with the advice and consent of the Senate shall appoint . . . Judges of the supreme Court," and this proposal was approved on September 7 by a unanimous vote. 2 M. Farrand, *supra*, at 495, 533. Although there is no record of the deliberations of the Committee of eleven which resulted in the current language of the Appointments Clause, *The Federalist* provides some insights into the rationale underlying the compromise reached by the Framers. Hence, the Hamilton article highlighted by the district court suggests that the principal rationale for assigning the nomination power to the President was one of public accountability: "[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation . . . In the act of nomination, his judgment alone would be exercised . . .." *The Federalist* No. 76, at 492-93 (E. Earle ed. 1937). This article also emphasized, however, the "powerful" role to be played in the process by the Senate, as well as the expectation that the advice and consent process would "be an excellent check upon a spirit of favoritism in the President . . .." *Id.* at 494.

In a sequel to this article (No. 77), Hamilton further expounded on the need for public accountability in the judicial appointment process, and he directed considerable criticism at the practice that existed in various states of making judicial appointments by private committees not subject to any public scrutiny:

> The council of appointment consists of from three to five persons, of whom the governor is always one. This small body, shut up in a private apartment, impenetrable to the public eye, proceed to the execution of the trust committed to them. It is known that the governor claims the right of nomination . . .; but it is not known to what extent, or in what manner he exercises it; nor upon what occasions he is contradicted or opposed . . . And while an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost . . . .
>
> Such council would also be more liable to executive influence than the Senate, because they would be fewer in number, and would act less immediately under the public inspection. Such a council . . . would be productive of an increase of expense, a multiplication of the evils which spring from favoritism and intrigue in the distribution of public honors, a decrease in stability in the administration of government, and a diminution of the security against undue influence of the Executive.

Id. at 500.

There is nothing, therefore, in either the constitutional debates themselves or in *The Federalist*, that suggests any constitutional defect in a statute such as FACA. To the contrary, these materials directly support the constitutionality of the Act in two distinct, but related, ways. First, the Framers were greatly interested in ensuring public accountability so that the public would be able to understand how any particular judicial appointment was made and assign responsibility accordingly. This certainly coincides with the objectives of FACA, which, as noted earlier,

seek to ensure that governmental advisory bodies, consisting of private individuals who are not otherwise accountable to the public, are held to minimum standards of public access and accountability. *See supra* at 23-24. Indeed, Hamilton's critique of "appointment councils" which acted without "public inspection" and had an "undue influence on the executive," recites the very evils that FACA was enacted to eliminate.

The second, related theme is that the Framers expected the Senate to play an informed, substantial role in determining whether to lend its consent to any particular nominee. Since the ABA Committee's recommendations have become a vital link in the chain of appointment, and are used by the Senate itself in reviewing nominations, a statutory scheme that furthers the Senate's understanding of the role and processes of the ABA Committee will certainly place the Senate in a better position to perform its advice and consent function effectively. Since FACA in no way deprives the President of his power to nominate federal judges, but, at the same time, promotes both public accountability and the Senate's ability to function as a meaningful check, the Act would seemingly have been greeted with approval by the Framers — not the approbation incorrectly imputed to them by the district court.

3. The district court's approach to the Appointments Clause not only lacks any foundation in the language or history of the Clause itself, but it also creates serious constitutional anomalies. In essence, the district court concluded that, because the Constitution gives the Senate an express role in the appointments process through the advice and consent function, Congress has *less* power to enact a general regulatory scheme that indirectly affects that process than it would otherwise have. App. 19a. This approach threatens to insulate from general legislative regulation all matters in any way related to the nomination process, as well as all matters bearing on the treaty making process, which is also subject to Senate approval. More importantly, it is con-

trary to the approach taken by this Court in both *Morrison* and *Nixon v. Administrator*.

In *Morrison*, the Court rejected the Justice Department's argument that Congress is prohibited from enacting laws that control the prosecution power simply because the President is assigned the responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. In other words, the Court found that the fact that the Constitution explicitly gives the President, but not Congress, a role in ensuring that the laws are faithfully executed does not, by itself, impose a barrier to duly-enacted legislation affecting the prosecutorial power. Similarly, although Congress has no express constitutional function in preserving and providing public access to the materials of former Presidents, this Court did not strike down the Materials Act as exceeding Congress' authority in *Nixon v. GSA*. If Article I authorizes Congress to enact statutes bearing on matters in which Congress has no express constitutional role — as the Court ruled in *Morrison* and *Nixon* — it is difficult to understand why Congress may not enact a general law that indirectly bears on the power of appointment, in which the Senate is given an explicit responsibility.

4. By incorrectly viewing the Senate's advice and consent power as a limitation on Congress' general authority to legislate, the decision below necessarily calls into question the constitutionality of a host of other statutory schemes that indirectly impact on the nomination process. For example, the D.C. Circuit has held that the Freedom of Information Act applies to questionnaire responses obtained by the Department of Justice from Senators, explaining the Senators' procedures for selecting and recommending potential judicial nominees, as well as information regarding individuals actually nominated. *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980). The court unanimously rejected the Justice Department's argument that the responses should not be subject to the FOIA because the "nomination of judges is a purely presidential function . . . and . . . the Presi-

dent's choice to draw the Attorney General into this presidential activity should not make the responses disclosable." *Id.* at 788. However, under the district court's reasoning, the Freedom of Information Act cannot constitutionally be applied to the questionnaires at issue in *Ryan* or, for that matter, to *any* documents linked to the nomination process, whether they are in the possession of the Justice Department, the Federal Bureau of Investigation, or another federal agency covered by the FOIA.[5]

The district court's formalistic approach also necessarily calls into question whether the various safeguards and requirements of the Privacy Act, 5 U.S.C. § 552a, can constitutionally be applied to materials regarding prospective judicial nominees. If "the legislative branch cannot intervene" in the nomination process in any fashion, as the district court ruled (App. 19a), then Congress cannot require the Department to maintain information regarding individuals under investigation "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness," *id.* § (e)(5), or afford such individuals civil remedies, including the right to seek amendment of inaccurate records, if these or other safeguards of the Privacy Act are violated by Justice Department employees. *Id.* § (g). In essence, the district court's erroneous analysis of the Appointments Clause not only invalidates the application of FACA to the ABA Committee, but it also improperly casts a cloud of unconstitutionality over all other general statutory schemes that may bear, either directly or indirectly, on the nomination process. There is nothing in the text of the Clause, its history, or the cases construing it that requires any such wholesale undermining of congressional authority.

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[5]Under the approach taken by the district court, if the ABA or anyone else had comparable committees to advise on Ambassadors, Department Heads, or other appointments within the executive branch, the application of FACA, FOIA and similar statutes to these committees would also be unconstitutional. Indeed, any records collected in connection with any prospective nomination for any officer covered by the Appointments Clause would be immune from disclosure as a matter of constitutional law.

B. General Separation Of Powers Principles Do Not Prohibit The Application Of FACA To The ABA Committee.

1. The district court also found that the application of FACA to the ABA Committee would violate general separation of powers principles, presumably by " 'impermissibly undermin[ing]' the powers of the Executive Branch . . . or 'disrupt[ing] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions . . . .' " *Morrison v. Olson*, *supra*, 108 S. Ct., at 2621, *quoting Commodity Futures Trading Comm'n v. Schor*, *supra*, 478 U.S., at 856 (1986), and *Nixon v. Administrator*, *supra*, 433 U.S., at 443. Once again, however, the court below pointed to no specific way in which FACA would undermine the executive branch, but, rather, simply asserted, without any explanation, that FACA creates a "significant potential for disruption of the President's constitutional prerogative . . . ." App. 20a.

As with its approach to the Appointments Clause, the district court's analysis of the separation of powers doctrine cannot withstand scrutiny. In the first place, there is no way that FACA, which was signed into law by President Nixon and has been applied by the executive branch to literally thousands of advisory committees over the past 17 years, "can possibly be construed as preventing the [Executive] Branch 'from accomplishing its constitutionally assigned functions . . . .' " *Mistretta*, *supra*, slip. op. at 34, *quoting Nixon v. Administrator*, *supra*, 433 U.S., at 443. Indeed, in contrast to *Morrison*, where it was "undeniable" that the independent counsel provisions of the Ethics in Government Act reduced the power of the Attorney General and the President to some extent, *see* 108 S. Ct., at 2621, there is no basis for concluding that any of FACA's requirements will impair the Justice Department's utilization of the ABA Committee at all, let alone that *all* of these requirements will invariably cause

a significant impairment, as the Justice Department argued and the district court held. Moreover, rather than focusing on those specific, threshold requirements of the statute that necessarily would be triggered by a finding that the Department's use of the Committee is subject to FACA, the district court considered provisions whose meaning, as applied to the ABA Committee, has not been defined by either the Justice Department or the courts, and whose potential for interference with the nominating process is, therefore, speculative and not ripe for review.

As noted earlier, if the Committee is covered by FACA, only three events will definitely occur: (1) the Department will be required to prepare a charter for the Committee that will inform the public of the Department's position regarding the purpose, function, and method of operation of the Committee, 5 U.S.C. App. II § 9(c); (2) the Department will designate a committee management officer who will be responsible for maintaining the records of the Committee, attending Committee meetings, ensuring that accurate records are kept of the Committee's business, and supervising overall compliance with FACA, *id.* § 8; and (3) the Department will provide the public with advance notice of all Committee meetings. *Id.* § 10(a)(2). The Justice Department has not argued, and the district court did not hold, that these administrative requirements alone would impair the President's nominating authority. Indeed, any such claim would border on the frivolous in light of the fact that even an advisory body like the Tower Commission was able to comply with these requirements, while conducting its extraordinarily sensitive investigation of the Iran-Contra affair. *See* 51 Fed. Reg. 43,718 (1986).

Instead, in finding the entire Act unconstitutional as applied to the ABA Committee, the district court focused its dissatisfaction on the portions of FACA that provide for access to some committee meetings and documents. Such a focus is misdirected for several reasons. First, as this Court noted in sustaining the Presidential Recordings and Materials Preservation Act, which

provides for public access to some of former President Nixon's materials:

> [o]f course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, e.g., the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Records Act, and a variety of other statutes. . . . Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy.

Nixon v. Administrator, *supra*, 433 U.S., at 445-46 (citations omitted). Moreover, just as the Materials Act authorizes the withholding of materials that require confidentiality on privacy or other legitimate grounds, 44 U.S.C. § 2111 note § § (b)(4), (5), the Advisory Committee Act also permits withholding on such grounds. Thus, the statute's exemptions parallel those contained in the Freedom of Information Act and Sunshine Act, two of the statutes which this Court cited with approval in *Nixon v. Administrator*.

Most important of all, the district court did not even mention the statutory exemptions that might be used by the Justice Department to safeguard from public scrutiny the very kinds of meetings and documents about which the court was concerned — *i.e.*, those focusing on the "competence, integrity, and temperament" of individuals. App. 24a. For example, the Department could properly invoke FACA's personal privacy exemption as a basis for maintaining the confidentiality of most, if not all, meetings and documents in which the credentials of individual candidates for federal judgeships are discussed. In fact, the district court even cited a Freedom of Information Act case, *Information Acquisition Corp. v. Department of Justice*, 3 GDS ¶ 83,149 (D.D.C. 1981), which squarely held that "documents collected by the FBI on a nominee for a federal judgeship" could

be kept secret under the FOIA's privacy exemption "because release would have violated substantial privacy interests . . . ." App. 22a. Yet the court below offered no explanation as to why the same exemption in FACA would not be adequate to safeguard records and meetings relating to *potential* judicial nominees, who, if anything, would appear to have a greater privacy interest than actual nominees.

Nor did the court reconcile its ruling with the fact that FACA's personal privacy exemption is routinely used by various agencies to withhold advisory committee materials focusing on the attributes and abilities of individuals. For example, the National Science Foundation, the National Endowment for the Arts and Humanities, and the National Institutes of Health, among other agencies, employ this exemption to close the meetings and withhold the documents of hundreds of peer review bodies that advise them as to whether individuals should receive federal grants and other benefits.[6] There is no relevant difference between these peer review bodies and the ABA Committee. Yet the former fully comply with FACA and still manage to maintain appropriate confidentiality, while the district court held that FACA could not be applied to the ABA Committee without violating the separation of powers doctrine.

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[6]*See, e.g.*, 53 Fed. Reg. 41,256 (1988) (National Science Foundation closing peer review discussions of "personal information concerning individuals associated with the proposals"); 53 Fed. Reg. 39,163 (1988) (same); 53 Fed. Reg. 35,939 (1988) (same); 53 Fed. Reg. 40,801 (1988) (National Foundation for the Arts and the Humanities closing peer review meeting because it will involve "information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); 53 Fed. Reg. 36,662 (1988) (same); 53 Fed. Reg. 34,837 (1988) (National Institutes of Health closing meeting "for the review of grant applications"); 53 Fed. Reg. 26,504 (1988) (same).

The only specific observation that the district court made with respect to FACA's exemptions is that the statute does not contain a general "deliberative process exemption" for advisory committee meetings and documents. App. 24a. However, the court never indicated why such an exemption is essential to the ABA Committee in light of the fact that hundreds of other advisory bodies have found the statute's existing exemptions to be adequate to protect material that requires secrecy. Indeed, since the ABA Committee's primary function — investigating and assessing the qualifications of individuals — directly implicates FACA's personal privacy exemption, the Committee would appear to be in far less need of a general deliberative process privilege than many, if not most, other advisory bodies.

Moreover, the district court not only failed to focus on FACA's actual exemptions, but it also overlooked the fact that the determination of whether to invoke them is committed to executive branch officials. Therefore, the public could gain access to a specific meeting or document of the ABA Committee only if the Justice Department itself decided not to claim an exemption, or if a court rejected such a claim in a specific case. Rather than presume that FACA's various requirements and exemptions would be applied by the Justice Department and interpreted by the courts in a sensible manner, consistent with legitimate interests in privacy and confidentiality, the district court simply leapt to the unwarranted conclusion that necessary confidentiality could not be maintained under FACA.[7]

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[7]The district court's approach to this and other issues may have been influenced by the Washington Legal Foundation's ideologically-based attack on the ABA Committee, which was made explicit in the complaint filed by WLF in its earlier lawsuit against the ABA Committee. *See* ***Washington Legal Foundation v. ABA***, 648 F. Supp. 1353, 1355 (D.D.C. 1986) ("WLF contends that the Committee's investigations 'have been conducted and are continuing to be conducted in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology.'") (quoting Complaint ¶ 26). In that lawsuit, WLF requested

2. Since there is no basis for concluding that the application of FACA to the ABA Committee will actually impair the Justice Department's ability to use the Committee at all, the district court should have rejected the Department's across-the-board constitutional assault without even scrutinizing the specific congressional purposes served by the Act. *See Morrison v. Olson, supra,* 108 S. Ct., at 2621-22; *Nixon v. Administrator, supra,* 433 U.S., at 443 ("[o]nly where the potentional for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress"). But, even if the interests advanced by FACA are needed to justify the statute's procedural requirements, the district court wrongly assumed that those interests are entirely coterminous with the purpose served by the constitutional confirmation process — *i.e.*, allowing the Senate to pass on individual judicial nominees — and as such are redundant and entitled to no weight in the constitutional calculus. Once again, neither the district court's premise nor its conclusion is correct.

The application of FACA to the ABA Committee may indeed assist the Senate in reviewing nominees for federal judgeships,

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as relief that it be granted access to all Committee meetings and even went so far as to suggest that the Committee should be reconstituted by the district court along ideological lines. *Id.*

In this Court, WLF has again emphasized its dissatisfaction with the ABA Committee, and has erroneously suggested that the application of FACA would provide for wholesale access to the Committee's meetings and documents. *See* WLF Jurisdictional Statement at 18 (claiming that "examples of ABA Committee abuse abound" and asserting that "appellant and other members of the public are less than sanguine about the integrity [of the Committee's] closed-door screening process"). However, neither WLF's extreme and unrealistic requests for relief under FACA, nor its underlying motivation for filing this case, should affect the Court's assessment of whether FACA's requirements and exemptions can be applied in a sensible fashion, consistent with the Committee's legitimate interests in confidentiality.

specifically by shedding additional light on the process by which the Committee arrived at its rating. Just as clearly, however, FACA was not enacted solely or even significantly to facilitate the Senate's advice and consent function. Instead, like such statutes as the FOIA and the Sunshine Act, it is a comprehensive, prophylactic measure that is intended to establish basic standards of accountability and openness for all governmental advisory bodies, such as the ABA Committee, that have a significant effect on the public. Certainly, the fact that the FOIA may also assist in the confirmation process does not mean that it is unconstitutional as applied to all documents relating to that process.

In addition, the interests served by applying FACA here are much broader than the district court assumed. As in all situations where the executive branch relies heavily on the work of an advisory committee, the public has a strong interest in having the Justice Department file a charter describing the Department's view of the ABA Committee's precise function and role, as well as the general criteria that are used by the Committee in assessing prospective judicial nominees. And while meetings and documents discussing individuals who are being evaluated may generally be closed to the public under FACA's exemptions, the public should be able to gain access to the Committee's general discussions of, for instance, the extent to which it should scrutinize the legal philosophy or political ideology of potential judicial candidates.

Likewise, if the Department complied with FACA, the public could learn more about the procedures the Committee uses to investigate and evaluate judicial candidates, as well as such matters as the manner in which the Committee votes on ratings. The public's strong interest in learning about the overall functioning, role, and influence of the ABA Committee is precisely the kind of interest that impelled Congress to enact FACA to regulate advisory committees generally. It is an interest that is not satisfied by the Senate's scrutiny of specific nominees, and neither the Justice Department nor the district court has offered any reason

why that interest cannot be furthered by applying FACA to the ABA Committee.

Moreover, the district court overlooked the fact that the Senate only performs its advice and consent function if an individual is actually nominated. When an individual is not nominated either because of a "not qualified" rating by the ABA Committee or for some other reason, the Senate's advice and consent role obviously is not triggered. Nevertheless, the ABA Committee may wield enormous influence over governmental decisionmaking in such situations, and hence there is a vital interest in ensuring that it complies with FACA's basic standards of public accountability. Thus, although FACA's personal privacy exemptions would probably allow the Department to withhold from the public all meetings and documents discussing specific individuals who are not ultimately nominated, the public should be able to learn more about the process the Committee employs to determine whether an individual is "not qualified," as well as the general considerations that underlie such a rating. In this way, the individual candidate's privacy interests would be protected, yet the public (and the Congress) would be better equipped to assess the role played by the Committee when it declares someone "not qualified" to be a federal judge.

Finally, the fact that the Senate "has the opportunity to question a representative from the ABA Committee" during Senate confirmation hearings does not, as the district court seemed to believe, distinguish the ABA Committee from other executive branch advisory bodies. App. 25a. Many influential advisory committees, such as the Tower Commission, the Grace Commission, and the Rogers Commission on the Challenger disaster, to name just a few, have been called on by both houses of Congress to explain their views and recommendations. The Justice Department has never argued that FACA may not constitutionally be applied to these committees simply because Congress had the "opportunity to question a representative" from them. App. 25a.

It is clear, therefore, that the Senate's ability to solicit testimony from one or more members of the ABA Committee has nothing to do with whether FACA's application to the Committee would further significant legislative interests. App. 25a.

C. There Is No First Amendment Barrier To A Ruling That FACA Applies To The Justice Department's Use Of The ABA Committee.

Finally, the ABA argued in its response to appellants' jurisdictional statements that FACA cannot be applied to the Department's use of the ABA Committee without violating the First Amendment rights of the members of the Committee. This argument should be rejected for a number of reasons. To begin with, although the ABA has been cognizant of this case since its inception, it did not participate before the district court, and, for that reason, the court never addressed the First Amendment issue. Ordinarily, this Court will consider only issues that have been raised and resolved in the lower federal courts. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 8-9 (1948). While this principle may occasionally yield "where injustice might otherwise result," *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), there is no reason to invoke that exception here.

To the contrary, since the ABA had raised its First Amendment argument in the prior FACA lawsuit filed by WLF — a lawsuit that was dismissed on the basis of the ABA's alternative argument that it was not a proper party in a FACA lawsuit — it is apparent that the ABA made a deliberate, tactical decision in this case not to present its First Amendment argument to the district court. The ABA should not be permitted to bypass lower court resolution of an argument and then press it before this Court.

Moreover, even if the Court were to entertain the ABA's First Amendment claim, it has no merit for the reasons articulated by the D.C. Circuit in one of the early FACA cases, *Center for Auto*

Safety v. Cox, supra. In that case, AASHTO, which was being utilized as an advisory committee by FHWA, advanced precisely the same argument that the ABA Committee is making here, *i.e.*, that the "application of FACA . . . to independent organizations [like AASHTO] acting as spokesmen for their members" would "interfere with first amendment freedoms." 580 F.2d at 694. Judge Robb, writing for a unanimous court, found "no 'serious constitutional problems inherent in the application of FACA' . . . to independent organizations." *Id.* at 694, *quoting* AASHTO Br. at 31. The reasons advanced by Judge Robb to support this conclusion are correct, and they require rejection of the ABA's claim here.

First, the D.C. Circuit explained that FACA "does not regulate AASHTO; it regulates the *FHWA's use of AASHTO as an advisory committee*." *Id.* at 693 (emphasis added). Thus, as the ABA itself tacitly conceded in moving to dismiss the earlier FACA action filed against it, FACA's provisions do not impose any obligations on independent organizations like the ABA, which "remain free to communicate their views" to the government and "free to lobby" the government on any issue they please. *Id.* at 694. Rather, the statute is directed at the government itself, and it is triggered only when a "federal executive official utilizes an advisory committee to assist him in discharging his responsibilities" — by affording the members of the committee special access to government information, and giving the committee's views special prominence in government decisionmaking. *Id.* As summarized by Judge Robb, "[t]he issue then, is not whether the application of FACA to independent organizations offends the rights of those organizations to communicate with the government; it is whether the Administrator [of the FHWA] has in this case 'utilized' [the organization] as an advisory committee." *Id.*

There is an even more basic reason why there is no infringement of First Amendment rights here. If an organization desires to be treated *more favorably* by the government than other members of the public — as is the case with an organization that

agrees to be used as an advisory committee — then it is not unconstitutional to subject its relationship with the government to minimum standards of openness and accountability. As the D.C. Circuit found in *Center for Auto Safety*, since AASHTO had received advance access to, and an opportunity to influence, the FHWA's draft proposed rulemakings — access and influence which had been denied other members of the public — the First Amendment gave it no right to avoid the requirements of FACA. 580 F.2d at 694. Likewise, since the ABA Committee is the only organization that is permitted to have advance notice of potential nominees, and it is the only organization whose views on nominees are routinely solicited and incorporated into the nomination process, it should not be heard to complain about the procedural requirements on which Congress has conditioned this sort of intimate involvement in government decision-making. Stated simply, if an organization accepts the benefits of being utilized as a federal advisory committee, there is nothing unreasonable — or, more importantly, unconstitutional — in requiring it to accept the accompanying responsibilities and procedural restrictions that this status entails.

In this connection, a hypothetical helps place the ABA Committee's First Amendment argument in context. Assume that instead of appellants pressing the FACA issue, the Justice Department had approached the ABA and said that it would no longer use the ABA's Committee as an advisory committee unless the Committee agreed to be chartered and otherwise comply with FACA. It is apparent that the Committee would not have a First Amendment right to insist that the Department continue to use it as an advisory committee *without* complying with FACA's chartering and other requirements. The only difference between that scenario and the one before the Court is that the FACA issue is being raised by appellants rather than the government, and that distinction has no bearing on the ABA's First Amendment claim.

Finally, the restrictions placed on the Department's use of the ABA Committee in this case are, if anything, less onerous than

those imposed on the government's use of the advisory committee at issue in *Center for Auto Safety*. As the D.C. Circuit noted, the application of FACA to the FHWA's use of AASHTO meant that most of the communications between the government and AASHTO would have to be undertaken "openly and publicly," since no exemption from FACA's openness requirements was applicable there. 580 F.2d at 694. In stark contrast, it is apparent that here, most, if not all, of the ABA Committee's discussions of particular judicial nominees could be kept confidential under the exemptions to the Act. Accordingly, there is simply no substance behind the ABA's rhetoric that the application of FACA will "destroy[ ] the confidentiality of the ABA Committee's evaluation process and chill[ ] speech on matters of public concern . . . ." ABA Mem. at 14. At bottom, the ABA's First Amendment argument, just like the Justice Department's separation of powers claim, is predicated on a wildly unrealistic vision of FACA, rather than a reasonable appraisal of the statute's actual provisions, which can be, and have been, applied in a manner that can easily accommodate any genuine need for secrecy and confidentiality.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's ruling that the Justice Department's utilization of the ABA Committee is subject to FACA, but should reverse the district court's decision declaring that FACA cannot constitutionally be applied to the Department's use of the Committee.

Respectfully submitted,

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